

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

v.

BRETT ALAN MILLER,

Defendant.

Case No. 3:15-cr-00047-HDM-WGC

ORDER

Defendant Brett Alan Miller has filed a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (ECF No. 38). The government has opposed (ECF No. 40), and Miller has replied (ECF No. 41).

In May 2015, Miller was charged with three counts of felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). (ECF No. 10). Pursuant to an agreement, Miller pled guilty to one count of felon in possession. (ECF Nos. 26 & 28). He was sentenced to a term of 77 months, followed by three years of supervised release. (ECF No. 34).

Section 922(g) prohibits the possession of firearms by several categories of persons, including any person who has been convicted in any court of a crime punishable by a term of more than one year in prison. 18 U.S.C. § 922(g)(1). At the time of his conviction, Miller had two prior felonies, including a 2010 federal bank robbery charge that resulted in a 46-month sentence. Miller was in fact on supervised release for the 2010 conviction when he committed the instant offense. See Case No. 3:10-cr-00038-HDM.

1 When Miller was charged and entered his plea in this case,
2 the government was not required to prove that he knew he was a
3 felon. *United States v. Enslin*, 327 F.3d 788, 798 (9th Cir. 2003).
4 But in 2019, the U.S. Supreme Court concluded that a defendant may
5 be convicted under § 922(g) only if the government proves that the
6 defendant "knew he belonged to the relevant category of persons
7 barred from possessing a firearm." *Rehaif v. United States*, 139 S.
8 Ct. 2191, 2200 (2019). On the basis of *Rehaif* and the government's
9 failure to charge or prove his knowledge of status, Miller now
10 moves to vacate his conviction.

11 Pursuant to 28 U.S.C. § 2255, a federal inmate may move to
12 vacate, set aside, or correct his sentence if: (1) the sentence
13 was imposed in violation of the Constitution or laws of the United
14 States; (2) the court was without jurisdiction to impose the
15 sentence; (3) the sentence was in excess of the maximum authorized
16 by law; or (4) the sentence is otherwise subject to collateral
17 attack. *Id.* § 2255(a).

18 Miller alleges that the omission of the *Rehaif* element from
19 the indictment and plea colloquy violated his Fifth Amendment
20 rights guaranteeing that a grand jury find probable cause to
21 support all the necessary elements of the crime and his Sixth
22 Amendment rights to notice of the charges and effective assistance
23 of counsel. He also alleges that the defective indictment deprived
24 the court of jurisdiction and that his plea was not knowing and
25 voluntary. The government responds by asserting that Miller has
26 waived his right to bring these claims and that his claims are
27 procedurally defaulted.

1 As part of his plea, Miller "waive[d] all collateral
2 challenges, including any claims under 28 U.S.C. § 2255, to his
3 conviction, sentence, and the procedure by which the Court
4 adjudicated guilt and imposed sentence, except non-waivable claims
5 of ineffective assistance of counsel." (ECF No. 26 at 15). Such
6 "[a]n unconditional guilty plea waives all non-jurisdictional
7 defenses and cures all antecedent constitutional defects, allowing
8 only an attack on the voluntary and intelligent character of the
9 plea." *United States v. Brizan*, 709 F.3d 864, 866-67 (9th Cir.
10 2013); see also *United States v. Espinoza*, 816 Fed. App'x 82, 85
11 (9th Cir. June 1, 2020) (unpublished disposition) (unconditional
12 plea waiver precludes all Fifth and Sixth Amendment claims except
13 to the extent they contest the court's jurisdiction or the
14 voluntariness of the plea). Thus, except to the extent Miller
15 attacks the jurisdiction of the court, alleges that his plea was
16 not knowing and voluntary, or asserts ineffective assistance of
17 counsel, his claims are waived.¹

18 Miller's jurisdictional argument is without merit. The
19 omission of an element from the indictment does not affect the
20 court's jurisdiction. *United States v. Cotton*, 535 U.S. 625, 630
21 (2002); *United States v. Ratigan*, 351 F.3d 957, 962-63 (9th Cir.
22 2003); see also *United States v. Burleson*, 2020 WL 4218317, at *1
23 (July 23, 2020) (unpublished disposition) (rejecting the
24 defendant's argument that omission of the *Rehaif* element deprived
25 the district court of jurisdiction); *Espinoza*, 2020 WL 2844542, at

26
27 ¹ Miller asserts that his waiver was not valid because the omission of
28 the *Rehaif* element rendered his plea unknowing and involuntary. As more
fully discussed *infra*, the court does not find this argument to be
persuasive.

1 *1 (same). *Cf. United States v. Singh*, 979 F.3d 697, 730 (9th Cir.
2 2020) (on direct appeal, reviewing omission of *Rehaif* element from
3 indictment for plain error).

4 Miller's claim that his plea was not knowing and voluntary is
5 procedurally defaulted. "If a criminal defendant could have raised
6 a claim of error on direct appeal but nonetheless failed to do so,
7 he must demonstrate" either "cause excusing his procedural
8 default, and actual prejudice resulting from the claim of error,"
9 *United States v. Johnson*, 988 F.2d 941, 945 (9th Cir. 1993), or
10 that he is actually innocent of the offense, *Bousley v. United*
11 *States*, 523 U.S. 614, 622 (1998).

12 "[C]ause for a procedural default on appeal ordinarily
13 requires a showing of some external impediment preventing counsel
14 from constructing or raising the claim." *Murray v. Carrier*, 477
15 U.S. 478, 492 (1986). Actual prejudice "requires the petitioner to
16 establish 'not merely that the errors at ... trial created a
17 possibility of prejudice, but that they worked to his actual and
18 substantial disadvantage, infecting his entire trial with error of
19 constitutional dimensions.'" *Bradford v. Davis*, 923 F.3d 599, 613
20 (9th Cir. 2019) (internal citation omitted).

21 Miller could have challenged the validity of his plea on
22 direct appeal but did not do so. The claim is therefore
23 procedurally defaulted.² It is unnecessary to resolve whether

24 ² Miller argues that his claims are not procedurally defaulted, relying
25 on *English v. United States*, 42 F.3d 473, 479-81 (9th Cir. 1994). *English*
26 concluded that the defendants' claim, which was based on new Supreme
27 Court law, was not defaulted because no procedural rule required the
claim to be raised on direct appeal. The court finds Miller's reliance
on *English* unavailing. As a subsequent Ninth Circuit panel recognized:

28 *English* was in fact careful to limit its holding to the state
of the law in 1989, which was relevant because of the

1 Miller can demonstrate cause for the default, because even if he
2 could, he cannot demonstrate prejudice.³

3 Miller committed the instant offense less than two years after
4 his release from a 46-month bank robbery sentence. Miller
5 acknowledged in his plea agreement that he had been previously
6 convicted of a felony. Even more importantly, however, he
7 acknowledged during his plea colloquy both that he had a prior
8 conviction and that he was aware at the time of his offense that
9 he was not allowed to possess a firearm. In light of Miller's
10 admissions that he knew he was a convicted felon and that he was
11 prohibited from possessing firearms, as well as his lengthy and
12 recent prior sentence, the court is not persuaded that the
13 inclusion of the *Rehaif* element in these proceedings would have
14 changed Miller's decision to plead guilty or that his plea was
15 involuntary as a result of the omission.

16 Miller appears to recognize as much and primarily argues
17 instead that the omission is structural error such that he is not
18 required to demonstrate prejudice to obtain relief.

19
20
21 procedural posture of that case; as *English* itself noted, by
22 1994 the law might well have moved beyond the 'rule violation'
23 requirement it recognized. . . . We recognize that *Bousley*
24 (and our *Johnson* case before it) reflect the current state of
the law: most claims are procedurally defaulted by both
federal and state prisoners in habeas proceedings when not
raised on direct appeal, absent a showing of cause and
prejudice or actual innocence.

25 *United States v. Braswell*, 501 F.3d 1147, 1150 n.1 (9th Cir. 2007).
26 However, even if, under *English*, the claims should not be considered
27 procedurally defaulted, the court would deny the motion on the
independent basis that it is entirely without merit, for all the reasons
discussed herein.

28 ³ Miller does not argue actual innocence.

1 "[C]ertain errors, termed structural errors, might affect
2 substantial rights regardless of their actual impact on an
3 appellant's trial." *United States v. Marcus*, 560 U.S. 258, 263
4 (2010) (internal punctuation and citations omitted). Thus,
5 structural error "warrant[s] habeas relief without a showing of
6 specific prejudice." *United States v. Withers*, 638 F.3d 1055, 1063–
7 64 (9th Cir. 2011). "But structural errors are a very limited class
8 of errors that affect the framework within which the trial
9 proceeds, such that it is often difficult to assess the effect of
10 the error." *Marcus*, 560 U.S. at 263 (internal punctuation and
11 citations omitted). Cases in which the Supreme Court has found
12 structural error include total deprivation of counsel, lack of an
13 impartial trial judge, violation of the right to a public trial
14 and an erroneous reasonable-doubt instruction. See *id.* (discussing
15 cases). In contrast, errors that have been found to be non-
16 structural include where the court instructed on an invalid
17 alternative theory of guilt, gave an instruction omitting an
18 element of the offense, or erroneously instructed the jury on an
19 element. *Id.* at 264 (discussing cases).

20 The Ninth Circuit has not yet addressed whether omission of
21 the *Rehaif* element from the indictment or the plea colloquy is
22 structural error. But the Third, Fifth, Seventh, Eighth, and Tenth
23 Circuits have concluded it is not. *United States v. Nasir*, -- F.3d.
24 --, 2020 WL 7041357, at *19, n.30 (3d Cir. Dec. 1, 2020); *United*
25 *States v. Coleman*, 961 F.3d 1024, 1030 (8th Cir. 2020); *United*
26 *States v. Payne*, 964 F.3d 652, 657 (7th Cir. 2020); *United States*
27 *v. Lavalais*, 960 F.3d 180, 187 (5th Cir. 2020); *United States v.*
28 *Trujillo*, 960 F.3d 1196, 1207 (10th Cir. 2020); see also *United*

1 *States v. Watson*, 820 Fed. App'x 397, 400 (6th Cir. 2020)
2 (unpublished disposition). *But see United States v. Gary*, 954 F.3d
3 194, 206 (4th Cir. 2020). The court agrees with the well-reasoned
4 opinions of these several circuit courts, as well as the district
5 courts that have addressed the issue, and concludes that a Rehaif
6 error does not fall within the limited class of errors the Supreme
7 Court has found to be structural.⁴

8 Finally, Miller asserts that that the *Rehaif* error deprived
9 him of effective assistance of counsel in violation of the Sixth
10 Amendment. For the reasons already discussed, Miller has not shown
11 a reasonable likelihood of a different outcome had counsel been
12 aware of the *Rehaif* element. *See Strickland v. Washington*, 466
13 U.S. 668, 696 (1984). Accordingly, to the extent Miller raises a
14 claim of deprivation of effective assistance of counsel, that
15 claim, too, is without merit.

16 Accordingly, because the claims raised in Miller's § 2255
17 motion are waived, procedurally defaulted and/or without merit, IT
18 IS THEREFORE ORDERED that the motion to vacate, set aside or
19 correct sentence (ECF No. 38) is hereby DENIED.

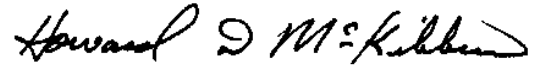
20
21
22
23 ⁴ The Ninth Circuit decisions cited by Miller are not to the contrary.
24 Each of these cases, and the cases on which they rely, held that defects
25 in the indictment are structural error only if timely raised, and they
26 each explicitly recognized that if the objection to the indictment is
27 not raised until direct appeal, it is subject to plain error review.
28 *See, e.g., United States v. Du Bo*, 186 F.3d 1177, 1179 & 1180 n.3 (9th
Cir. 1999) ("We hold that, if properly challenged prior to trial, an
indictment's complete failure to recite an essential element of the
charged offense is not a minor or technical flaw subject to harmless
error analysis, but a fatal flaw requiring dismissal of the indictment.
. . . Untimely challenges to the sufficiency of an indictment are
reviewed under a more liberal standard.").

1 IT IS FURTHER ORDERED that Miller is DENIED a certificate of
2 appealability, as jurists of reason would not find the court's
3 denial of the motion to be debatable or wrong.

4 The Clerk of Court shall enter final judgment accordingly.

5 IT IS SO ORDERED.

6 DATED: This 8th day of December, 2020.

7
8 

9 UNITED STATES DISTRICT JUDGE